IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs December 12, 2006

# STATE OF TENNESSEE v. ALTON RAY THOMAS

**Direct Appeal from the Circuit Court for Bedford County**
**No. 15,918 Lee Russell, Judge**

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**No. M2006-00815-CCA-R3-CD - Filed February 13, 2007**

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The appellant, Alton Ray Thomas, pled guilty in the Bedford County Circuit Court to driving under the influence (DUI), fifth offense, and driving on a revoked licence, fifth offense. The trial court imposed a total effective sentence of three years, eleven months, and twenty-nine days. On appeal, the appellant challenges the trial court's failure to grant alternative sentencing, specifically community corrections. Upon our review of the record and the parties's briefs, we affirm the judgments of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court are Affirmed.**

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which ALAN E. GLENN and D. KELLY THOMAS, JR., JJ., joined.

Andrew Jackson Dearing, III, Shelbyville, Tennessee, for the appellant, Alton Ray Thomas.

Robert E. Cooper, Jr., Attorney General and Reporter; Elizabeth B. Marney, Senior Counsel; Charles F. Crawford, District Attorney General; and Michael D. Randles, Assistant District Attorney General, for the appellee, State of Tennessee.

## OPINION

### I. Factual Background

On January 5, 2006, the appellant pled guilty to DUI, fifth offense, a Class E felony, and driving on a revoked licence, fifth offense, a Class A misdemeanor. At the guilty plea hearing, the State recited the following factual basis for the pleas:

> [O]n August 10th of this year, Agent Tim Miller of the Drug Task Force was traveling on Highway 64 and he was behind a Toyota Celica and he could see that it was occupied by one male subject. He observed that the vehicle kept swerving from left to right crossing the

> centerline and then crossing the outside line. . . . He also paced the car which was doing at times over 70 miles an hour, and this was inbound towards the city of Shelbyville.
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> He ran the tag which came back registered to the [appellant]. The vehicle encountered some other cars. It eventually pulled in to the convenience store . . . there at the intersection of Highway 64 and Highway 231 South. The vehicle pulled into a parking space, and Agent Miller pulled in actually behind the vehicle. And at that point the vehicle, the backup lights came on and began to back up, so Agent Miller actually had to blow his horn to alert the driver that he was back there. The vehicle did stop. Agent Miller approached the driver side. The [appellant] was the driver. He explained the reason for stopping him. He asked for registration. The registration was in the name of the [appellant]. He asked for a driver's license and the [appellant] stated he did not have a driver's license. He asked the [appellant's] name and, of course, he told him his name was Alton Ray Thomas.
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> It was during this that Agent Miller could smell an odor of alcohol coming from the [appellant]. He, of course, by then alerted local law enforcement what he was doing and a number of officers from the police department arrived on the scene. One of those was asked to administer a Field Sobriety Test, which Agent Miller observed. And in Agent Miller's mind and in the mind of the officer who performed the test that the [appellant] did poorly indicating that he was under the influence of an intoxicant.
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> The [appellant] was arrested for – and a driver's status was checked and it was determine[d] he was revoked, so the [appellant] was arrested for DUI and driving on revoked. He was taken to the police department. He was explained his implied consent rights and the [appellant] agreed to take a Breathalyzer. He did, and it was a .19.
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> And, of course, again, his driver's license is revoked and he does have the prior convictions which are listed in the indictment.

The appellant's plea agreement did not contain an agreement regarding sentencing. Accordingly, the trial court scheduled a sentencing hearing.

At the sentencing hearing, the parties relied upon the proof adduced at the sentencing hearing and the presentence report. Based upon two prior burglary convictions, the trial court found the

appellant to be a Range II offender. The trial court noted that the appellant had an extensive criminal record consisting of convictions for domestic violence, misdemeanor evading arrest, simple possession of marijuana, and reckless driving as well as six convictions for DUI and five convictions for driving on a revoked licence. The trial court imposed a sentence of three years for the DUI conviction and a sentence of eleven months and twenty-nine days for the driving on a revoked license conviction. The trial court then stated, considering the appellant's extensive criminal record, "I don't believe that he is an appropriate candidate for alternative sentencing. . . . I think he's a high risk to repeat unless he is incarcerated." On appeal, the appellant challenges the trial court's refusal to grant alternative sentencing, specifically community corrections.

## II. Analysis

Appellate review of the length, range or manner of service of a sentence is de novo. See Tenn. Code Ann. § 40-35-401(d) (2003). In conducting its de novo review, this court considers the following factors: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on enhancement and mitigating factors; (6) any statement by the appellant in his own behalf; and (7) the potential for rehabilitation or treatment. See Tenn. Code Ann. §§ 40-35-102, -103, -210 (2003); see also State v. Ashby, 823 S.W.2d 166, 168 (Tenn. 1991). The burden is on the appellant to demonstrate the impropriety of his sentence. See Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments. Moreover, if the record reveals that the trial court adequately considered sentencing principles and all relevant facts and circumstances, this court will accord the trial court's determinations a presumption of correctness. Id. at (d); Ashby, 823 S.W.2d at 169.

We recognize that an appellant is eligible for alternative sentencing if the sentence actually imposed is ten years or less. See Tenn. Code Ann. § 40-35-303(a) (2006). Moreover, an appellant who is an especially mitigated or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing. See Tenn. Code Ann. § 40-35-102(6). In the instant case, the appellant was sentenced as a Range II multiple offender; therefore, he is not presumed to be a favorable candidate for alternative sentencing. Regardless, because the sentences imposed were ten years or less, the appellant is still eligible for alternative sentencing.

The Community Corrections Act of 1985 was enacted to provide an alternative means of punishment for "selected, nonviolent felony offenders in front-end community based alternatives to incarceration." Tenn. Code Ann. § 40-36-103(1). Tennessee Code Annotated section 40-36-106(a)(1) (2003) provides that an offender who meets all of the following minimum criteria shall be considered eligible for community corrections:

> (A) Persons who, without this option, would be incarcerated in a correctional institution;

(B) Persons who are convicted of property-related, or drug-or alcohol-related felony offenses or other felony offenses not involving crimes against the person as provided in title 39, chapter 13, parts 1-5;

(C) Persons who are convicted of nonviolent felony offenses;

(D) Persons who are convicted of felony offenses in which the use or possession of a weapon was not involved;

(E) Persons who do not demonstrate a present or past pattern of behavior indicating violence;

(F) Persons who do not demonstrate a pattern of committing violent offenses.

An offender is not automatically entitled to community corrections upon meeting the minimum requirements for eligibility. State v. Ball, 973 S.W.2d 288, 294 (Tenn. Crim. App. 1998).

For offenders not eligible for community corrections under subsection (a), Tennessee Code Annotated section 40-36-106(c) creates a "special needs" category of eligibility. Subsection (c) provides that

> [f]elony offenders not otherwise eligible under subsection (a), and who would be usually considered unfit for probation due to histories of chronic alcohol, drug abuse, or mental health problems, but whose special needs are treatable and could be served best in the community rather than in a correctional institution, may be considered eligible for punishment in the community under the provisions of this chapter.

Tenn. Code Ann. § 40-36-106(c).

When determining a defendant's suitability for alternative sentencing, courts should consider whether the following sentencing considerations, set forth in Tennessee Code Annotated section 40-35-103(1), are applicable:

(A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;

(B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or

> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

Additionally, "[t]he potential or lack of potential for the rehabilitation or treatment of the defendant should be considered in determining the sentence alternative or length of a term to be imposed." Tenn. Code Ann. § 40-35-103(5). A defendant with a long history of criminal conduct and "evincing failure of past efforts at rehabilitation" is presumed unsuitable for alternative sentencing. Tenn. Code Ann. § 40-35-102(5).

On appeal, the appellant argues that the "crimes he committed were not of a violent nature and he committed these crimes because of his necessity to care for his children. He is in need of job training and in need of help in raising his children. Because of these issues he is eligible for Community Corrections." Initially, we note that the appellant did not advance the foregoing argument in the trial court. In fact, the only arguments relating to sentencing posited by the appellant in the trial court were that he should be considered a Range I offender and that the trial court should "sentence the [appellant] no more than a year and a half on the DUI and . . . run the driving on revoked concurrently."

Regardless, the trial court found, after considering the appellant's extensive criminal record, "I don't believe that he is an appropriate candidate for alternative sentencing. . . . I think he's a high risk to repeat unless he is incarcerated." As we noted earlier, the appellant has two burglary convictions, six DUI convictions, five driving on a revoked license convictions, in addition to convictions for domestic violence, misdemeanor evading arrest, simple possession of marijuana, and reckless driving. In many of the foregoing cases, the appellant received a suspended sentence; yet, he has continued to reoffend. We conclude that, given the appellant's extensive criminal record and his failure to rehabilitate, the trial court did not err in failing to sentence the appellant to community corrections.

## III. Conclusion

Finding no reversible error, we affirm the judgments of the trial court.

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NORMA McGEE OGLE, JUDGE